No. 93-1286

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

AMERICAN AIRLINES, INC.,
Petitioner,
v.
MYRON WOLENS, ALBERT J. GALE, R. CRAIG ZAFIS, BRET MAXWELL, ROBERT NELSON and P.S. TUCKER,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Illinois

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF AIR TRANSPORT ASSOCIATION OF AMERICA IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF AIR TRANSPORT ASSOCIATION OF AMERICA IN SUPPORT OF PETITIONER

Pursuant to Rule 37.2, the Air Transport Association of America ("ATA") moves for leave to file a brief *amicus curiae* in support of American Airlines' Petition For *Certiorari* from the decision of the Illinois Supreme Court issued December 16, 1993, after remand from this Court "for further consideration in the light of *Morales v. Trans World Airlines, Inc.*, 504 U.S. ——."

In support of this motion it is stated that:

1. Consent to the filing of an *amicus* brief by ATA was sought in writing from counsel for all respondents and was denied in writing by said counsel. Petitioner has consented to the filing of an *amicus* brief by ATA.

2. The ATA is a non-profit unincorporated trade association of federally certificated air carriers providing scheduled passenger and cargo service. ATA's members account for more than 97 percent of the domestic passenger and cargo traffic flown annually by U.S. carriers.*

ATA's principal functions are to represent the interests of the commercial airline industry before Congress, state legislatures, and before federal and state courts. ATA also works closely with the various federal agencies which regulate the airline industry, such as the Federal Aviation Administration and the Department of Transportation. ATA has filed numerous amicus briefs in federal and state court proceedings concerning a wide variety of issues of interest to its members.

ATA's members have a vital interest in the outcome of this case, which has far-reaching consequences to the airline industry. Almost all of ATA's passenger airline members have a frequent flyer award program similar to the award program offered by American Airlines. Indeed, this suit against American Airlines is only one of more than five such suits which have been brought against airlines in the Circuit Court of Cook County, Illinois, because of changes in frequent flyer programs.

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* ATA's members are: Operator Members: Alaska Airlines, Aloha Airlines, American Airlines, American Trans Air, Continental Airlines, Delta Air Lines, DHL Airways, Evergreen International, Federal Express, Hawaiian Airlines, Northwest Airlines, Reeve Aleutian Airways, Southwest Airlines, Trans World Airlines, United Air Lines, United Parcel Services, USAir.

Associate members are Air Canada and Canadian Airlines International.

The decision below marks Illinois as the forum of choice for debilitating nationwide class action damage suits against the airline industry which are designed to restrict and effectively to regulate general competitive programs and practices adopted by members of the industry as applicable to all their respective passengers.

Each airline's frequent flyer program may differ in certain respects from the program of other airlines, and changes in the airline's program may be made at different times or in a different manner than those of other airlines. It is the broad picture, industry-wide, of the impact of interference from multiple-State laws on the freedom to administer frequent flyer programs in a competitive industry which ATA is particularly qualified to bring to the Court's attention. The broad contentions here of plaintiffs' class action under Illinois common and statutory law, if accepted, could require the highly successful frequent flyer programs—progeny of Congress' decision to infuse free market competition into the U.S. airline industry—to be radically modified or even terminated to the substantial public detriment. Moreover, Illinois' open invitation to bring nationwide class action suits for damages against airlines threatens all of the innovative competitive practices and policies adopted by airlines since Congress deregulated the airline industry in 1978, in direct contravention of the purposes of the Airline Deregulation Act.

The brief *amicus curiae* submitted by ATA highlights for the Court the important role in the airline industry played by frequent flyer and other competitive marketing programs and the importance of reviewing the decision below in order to keep these industry-wide aspects of competitive airline operations free from control by the State of Illinois and from varying controls in 50 states.

WHEREFORE, ATA prays that leave to file the attached brief *amicus curiae* in support of the Petition For *Certiorari* of American Airlines be granted.

Respectfully submitted,

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QUESTION PRESENTED

In the light of *Morales v. T.W.A.*, can the States in effect regulate system-wide competitive programs and practices of the nation's commercial airlines by permitting nationwide class suits for damages against the airlines under State common law and consumer protection statutes?

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BRIEF *AMICUS CURIAE* OF AIR TRANSPORT ASSOCIATION OF AMERICA IN SUPPORT OF PETITIONER

OPINION BELOW

The opinion of the Illinois Supreme Court on remand from this Court "for further consideration in the light of *Morales v. T.W.A.*" is reproduced in Appendix A (pp. 1a-16a) of the Petition for *Certiorari*.

STATUTORY PROVISIONS INVOLVED

Section 105(a)(1) of the Airline Deregulation Act of 1978, 49 U.S.C. Sec. 1305(a)(1):

> ". . . [N]o State or political subdivision thereof . . . shall enact or enforce any law, rule, regulation, standard or other provision having the force and effect of law relating to rates, routes or services of any air carrier. . . ."

THE INTEREST OF AIR TRANSPORT ASSOCIATION *AMICUS CURIAE*

O'Hare International Airport is the busiest airport in the nation. All of the major commercial airlines operate there and are subject to the jurisdiction of the local county courts to which are entrusted the enforcement of the vague and expansively-worded Illinois Consumer Fraud Act and Illinois common law.

A class suit filed under Illinois law in Cook County, Illinois, against an airline or several airlines cannot be removed to the federal court. *Zahn v. International Paper Co.*, 414 U.S. 291 (1973); *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 63-64 (1987). The decision of the Illinois Supreme Court gives the local courts undue power to pass upon the propriety of the airlines' actions in connection with their system-wide marketing and operational policies, and threatens to engulf all the major carriers in restrictive and costly nationwide class suits seeking crippling amounts of damages and attorneys' fees.

Already more than five such suits have been brought in the Circuit Court of Cook County, Illinois, against major airlines challenging changes in their respective competitive frequent flyer programs. One of these, against Delta Air Lines, Inc., has been dismissed without prejudice with leave to re-file depending on the final outcome in this *Wolens* case.

The Air Transport Association, as *amicus curiae*, strongly believes that if the decision below of the Illinois Supreme Court stands, airline deregulation will become a nightmare of local restrictions on the airlines' competitive policies and practices, first in Illinois, as the forum of choice for nationwide class actions against airlines, and then in other States, should this Court refuse to act in this case. Under airline deregulation, as formulated by Congress, freedom from divergent state law requirements, particularly from requirements of 50 states, is essential to the administration and implementation of vigorous price and service competition throughout the airline industry. This was the express purpose of the Airline Deregulation Act of 1978 in general and of Section 1305(a)(1) of the Act in particular. Forcing the nation's airlines to conform their competitive practices and policies to the vagaries of local laws stands the Airline Deregulation Act on its head.

Amicus speaks for its members, who comprise most of the nation's airlines, when it urges that the competitive framework of commercial air transportation in this country—and the accompanying benefits to consumers and commerce—is seriously jeopardized by the decision below.

STATEMENT OF THE CASE

Frequent flyer programs are a significant part of the rate and service structure of today's commercial air carriers. They are a prime device for marketing the rates and services of one airline as against its competitors and constitute one of the most creative competitive innovations of the post-deregulation era. The Department of Transportation has recognized that, in addition to stimulating competition, frequent flyer programs have generated enormous and increasingly broad benefits to consumers. (DOT Report, "Secretary's Task Force on Competition in the U.S. Domestic Airline Industry", February 1990, pp. 31-41).

The air travel benefits of airline frequent flyer programs are a significant factor in the airlines' ability to market their product and have a substantial—not a tenuous, remote or peripheral—impact upon airline rate and service structures. Frequent flyer bonuses are often used in place of fare discounts to stimulate additional traffic, in a manner that entails less risk than, for example, broadly lower-

ing fares.[1] Like all operators in a highly competitive environment, the airlines have dramatically and continually enhanced the travel benefits available under their programs and, in order to manage the cost impact, have modified the terms under which awards are earned.

Amicus incorporates the Statement of the Case contained in the Petition for *Certiorari*.

SUMMARY OF ARGUMENT

The Illinois Supreme Court has openly misapplied *Morales* in its decision on remand, with the result of establishing Illinois as a haven for nationwide class suits. The effect is to regulate *de facto* under state law the panoply of competitive marketing programs and practices adopted by the nation's airlines. Already, all of the largest passenger carriers have faced legal challenges in Illinois state courts—involving millions of airline passengers—concerning the administration of an important competitive initiative, namely, frequent flyer programs.

Frequent flyer programs are an integral part of the rate and service structure of commercial airlines under deregulation, just as are many, if not most, of the general policies or practices adopted by the airlines in order to survive in a highly competitive industry. If the decision below is allowed to stand, then the flood-gates are opened to the very evil of local interference with the air transportation system which Section 1305(a)(1) was intended to prevent.

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[1] See, e.g., *New York Times*, Sunday, January 17, 1993, Travel Section, "Frequent Flyer Bonuses Bloom."

ARGUMENT

I. THIS COURT SHOULD GRANT *CERTIORARI* BECAUSE THE DECISION BELOW HAS A DIRECT IMPACT ON THE RATES AND SERVICES OF EVERY PASSENGER AIR CARRIER AND IT COMPROMISES THE ENTIRE FEDERAL SCHEME FOR DEREGULATING THE NATION'S AIR TRANSPORTATION SYSTEM.

The Airline Deregulation Act of 1978 was expressly intended to substitute competition for regulation of the commercial airlines. The airlines have adapted their operations to meet the demands of the marketplace and disruption thereof would be catastrophic to the industry as a whole. Pre-emption under Section 1305(a)(1) was specifically designed to prevent the disastrous effect upon the airlines of a State or States substituting local regulation to fill the void left by federal deregulation. Section 1305(a)(1)'s "broad pre-emptive purpose" (*Morales*, 112 S. Ct., at p. 2037) is essential to nurturing vigorous competition with respect to rates, routes and services and to the operation of the national air transportation system.

Under *Morales*, pre-emption applies to state laws which "have a significant impact upon the airlines' ability to market their product, and hence a significant impact on the fares they charge" even if "the effect [of these factors] is only indirect" ("tangential") on the airlines' specific published rates and services. *Morales*, 112 S. Ct., at pp. 2038, 2040. The very essence of a frequent flyer program is its use as a marketing device to sell the airline's product of air transportation, just as the Complaint in this case alleges. (Pet. App. 5a.) An airline ticket or a service upgrade acquired under a frequent flyer program obviously has a direct "connection with or reference to" the rates and services of the carrier (*Morales*, 112 S. Ct., at p. 2037), and the disregard of that connection by the court below—on grounds that pre-emption only applies to historically "essential" elements (i.e., back to the era of regulation)

to the c eration of an airline and does not apply to suits for damages—is patently insupportable.

Despite this Court's clear directive in *Morales*, the Illinois Supreme Court has applied Section 1305 narrowly, and indeed has adopted a constricted test that leaves the States free to apply their varying local laws to all aspects of an air carrier's operations and services that the state courts do not consider "essential." (Pet. App. 6a.) The Illinois Supreme Court further concluded that Respondents' claims for compensatory and punitive damages are not pre-empted because a damage award does not "seek to establish the rates airlines must charge, or determine the routes airlines must fly, or dictate the services airlines must provide." (Pet. App. 6a.) As Justice McMorrow pointed out in her dissent, that test effectively limits the scope of pre-emption to state laws that actually *regulate* airline rates, routes or services—a standard that *Morales* explicitly rejected as reading the words "relating to" out of the pre-emption statute (112 S. Ct., at 2037-38) and as effectively excluding from pre-emption all state common law and all state statutes and regulations that do not expressly target airlines. (Pet. App. at 9a.) Indeed, the Seventh Circuit has held that an award of damages sought under the same Illinois common law and consumer protection statute at issue below was pre-empted under *Morales* and Section 1305 precisely because a damage award would constitute improper state regulation of airline "rates." *Statland v. American Airlines, Inc.*, 998 F.2d 539, 542 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 603 (1993).

By limiting the reach of Section 1305 to "essential" airline operations, the Illinois Supreme Court has created an exception that engulfs the rule of pre-emption. Its decision is an open invitation to plaintiff class action suits and ensures that Illinois will be the leading forum of nationwide litigation against airlines. Indeed, that phenomenon already has occurred. As Petitioner points

out, American, United and Delta, the nation's three largest air carriers, are the subject of nationwide class actions brought in Illinois challenging the carriers' practices with respect to ticket refund policies and their administration of frequent flyer programs.[2] If the decision below is allowed to stand, Illinois law will be used to determine the legal obligations of the major air carriers to millions of passengers throughout the nation, and thus will establish a *de facto* national standard to which the airlines must conform their conduct. As a result, the key objective of the Airline Deregulation Act—to encourage innovative competition without local interference—is seriously threatened. Even now the airlines are under enormous pressure to operate their frequent flyer programs in accordance with the particular requirements of Illinois law and the NAAG Guidelines, to which Illinois is a signatory.[3]

As the concentration of class action suits against airlines in Illinois demonstrates, plaintiffs clearly understand that Illinois offers the most hospitable forum in the country in which to sue airlines. This pattern is certain to expand to encompass other features of airline rates, routes and services that extend well beyond frequent flyer programs and airline ticket refund policies. In broad-ranging contexts, Illinois law will determine whether particular features of airline operations are "essential", and therefore pre-empted, or "not essential" and therefore subject to the requirements of local law. *See, e.g., Corporate Travel Consultants v. United Airlines, Inc.*, 799 F.Supp. 58 (N.D. Ill. 1992) (although state law claims chal-

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[2] See Petition For *Certiorari*, p. 11, n.18, 19, 20. Since the Illinois Supreme Court's decision yet another class action suit against an airline has been filed in the Circuit Court of Cook County, Illinois, challenging changes that the carrier made in its frequent flyer program. *Greenberg v. United Airlines*, No. 94 CH 499.

[3] See *Morales v. Trans World Airlines, Inc.*, 112 S.Ct. 2031 (1992), Appendix to Opinion, 112 S.Ct., at pp. 2049-2054.

lenging airline's use of computerized reservation systems "relate to" rates under *Morales*, federal court did not have removal jurisdiction and action was remanded to Illinois state court). Under the Illinois Supreme Court's test, longevity appears to be the touchstone for determining what is "essential" to airline operations ("the airline industry functioned successfully for decades" without frequent flyer programs.) (App. 6a)). That standard would cover all of the competitive innovations, contemplated by Congress, that the airlines have implemented since Congress enacted the Deregulation Act in 1978. In this era, in which many air carriers are struggling to remain solvent, the airlines can ill afford to have their ability to compete crippled by compliance with purely local restrictions. Because the decision of the Illinois Supreme Court threatens precisely that result, it is imperative that this Court grant review.

II. THIS COURT SHOULD GRANT *CERTIORARI* BECAUSE ADDITIONAL GUIDANCE IS NEEDED IN ORDER TO ELIMINATE THE CONFLICT BETWEEN THE DECISION BELOW AND THE DECISIONS OF THE FEDERAL COURTS OF APPEALS AND OTHER LOWER COURTS.

The decision below stands in direct conflict with the decisions of federal courts of appeals, including the Seventh Circuit, with which the Illinois Supreme Court shares concurrent geographic jurisdiction. The conflict between many decisions of the lower courts and the decision below attests to the urgent need for additional guidance on the scope of Section 1305(a)(1) preemption.

These conflicts involve both the scope of the "relating to" language in Section 1305(a)(1) and the question whether preemption turns on the form of relief requested. The Seventh Circuit has applied Section 1305 in precisely the straight-forward manner that *Morales* and the plain language of the statute command, holding that state law claims for money damages based on an airline's ticket refund policies "obviously" relate to airline rates.

Statland v. American Airlines, Inc., 998 F.2d 539, *cert. denied*, 114 S.Ct. 603 (1993). Under the Illinois Supreme Court's "essential operations" test, however, it is unlikely that the claims presented in *Statland*, which were brought under the same Illinois common law and consumer fraud statute that respondents invoke here, would have been pre-empted.

Likewise, the decision below, which broadly excludes from pre-emption all claims involving frequent flyer programs because those programs are not "essential," directly conflicts with *Shaefer v. Delta Air Lines, Inc.*, No. 92-1170-E (LSP) (S.D. Cal. 1992), which holds that damage claims asserted on behalf of members of an airline's frequent flyer program "relate to" airline services and are pre-empted.

The Fifth Circuit has held that airline "services," as used in Section 1305, encompass all state law claims relating to "the contractual arrangement between the airline and the user of the service." *Hodges v. Delta Air Lines, Inc.*, 4 F.3d 350, 354 (5th Cir. 1993), *pet'n for rehearing en banc granted*, 1994 WL 6232 (Jan. 12, 1994). All of the class actions now pending in Illinois state courts, including the *Wolens* case, involve the contractual relationship between airline and passenger and would appear to be pre-empted in the Fifth Circuit.

The lower courts have also reached decisions conflicting with the decision below regarding whether preemption under Section 1305 turns on the form of relief requested. For example, in *West*, a suit by a single passenger for an individual wrong, the Ninth Circuit held that an award of punitive damages under state law against an air carrier for "bumping" a passenger from an oversold flight is pre-empted because it would penalize an airline for engaging in "accepted forms of price competition and reduction in the deregulation era." *West v. Northwest Airlines*, 995 F.2d 148, 152 (9th Cir. 1993), *cert. den.* 62 U.S.L.W. 3396 (2/22/94) (No. 93-803). In contrast, the decision below allows claims

for punitive damages, as well as compensatory damages, to stand. In *Vail v. Pan Am Corp.*, 616 A.2d 523 (N.J. 1992), the court specifically rejected the argument that claims for damages were not pre-empted because they did not seek to "regulate" the airline's conduct and that any effect of a damage award on rates, routes or services would be "remote." 616 A.2d at 525. The court concluded that "plaintiffs challenge the 'service' itself and demand as damages the return of the 'rate' the airlines charged for services never provided." (*Id.*, at 527.) The Illinois Supreme Court held in the decision below that respondents' request for an injunction was pre-empted because it would constitute regulation of airline services, but that an award of damages, including punitive damages, is not pre-empted because damages do not "establish the rates airlines must charge, or determine the routes airlines must fly, or dictate the services airlines must provide". (App. at 6a.)

The "connection with or reference to rates, routes or services" is clear when a class suit is brought for virtually unlimited amounts of damage on behalf of all present and former passengers because of a general marketing practice adopted in order to sell airline seats in a highly competitive industry. Many, if not most, such general policies and practices will "relate to" rates, routes or services within the meaning of *Morales*—just as in this case the frequent flyer program does. In such nationwide class suits, state regulation, contrary to Section 1305(a)(1), "can be as effectively exerted through an award of damages as through some form of preventative relief". *Cipollone v. Liggett Group*, 112 S.Ct. 2608, 2620 (1992). *See also, San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 239, 246-9 (1959).

The major carriers conduct business in each of the 50 states. If the decision below regarding Section 1305 (a)(1) is permitted to proliferate, the airlines will confront the impossible task of attempting to conform their conduct to the varying and inconsistent standards of each

jurisdiction in and through which they transport passengers. The only way that the airlines can protect themselves from crippling damage suits in one jurisdiction or another is to conform the conduct of their system-wide programs and practices to the laws of the State that establishes the most restrictive regulatory standards—in effect substituting state law for the federal regulation that Congress eliminated in 1978. That is precisely the nightmare of local regulation that Congress intended to preclude when it enacted Section 1305(a)(1) of the Airline Deregulation Act of 1978.

Certiorari should be granted because additional instruction from this Court, addressed to the grounds of the decision below, is urgently needed.

CONCLUSION

The decision below jeopardizes the Congressional goal of stimulating vigorous innovative competition under deregulation of the nation's airlines. This Court should grant *Certiorari*, adopt the dissenting opinion below, summarily reverse the decision of the Illinois Supreme Court and remand the case for dismissal of the plaintiffs' class suit claims.

Respectfully submitted,

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